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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ARIEL PREMINGER et al., Plaintiffs and Respondents, v. MAURICE BENBENISTE et al., Defendants and Appellants,	B196086 (Los Angeles County Super. Ct. Nos. BC334769 & BC335221)

APPEAL from a judgment of the Superior Court of Los Angeles County. Brett C. Klein, Judge. Affirmed and remanded with directions.

Kehr, Schiff & Crane and Joel P. Schiff for Appellants.

Zimmermann, Koomer, Connolly, Finkel & Gosselin and Scott Z. Zimmermann for Respondents.

Having invested $345,000 in a real estate development, Maurice Benbeniste appeals from a judgment which may award him less than his initial investment. Benbeniste claims multiple errors by the trial court which he contends require reversal of the judgment, including: (1) the judgment fails for uncertainty; (2) the trial court exceeded its jurisdiction; (3) the trial court erred by failing to issue a statement of decision; (4) no substantial evidence supports the trial court's findings; (5) he was entitled to a jury trial; and (6) he was entitled to prejudgment interest on the award. We affirm in all respects except that we find the judgment uncertain as to the precise amount to be paid to Benbeniste and whether prejudgment interest is owed on that amount. We remand to the trial court on these limited issues for a determination.

FACTS

In March 2004, Benbeniste, operating as Tenzing, LLC, entered into an agreement with Ariel Preminger and David Glasberg to develop two residential properties. Preminger and Glasberg, long-time business associates operating as Magnified Properties, LLC, found the properties and personally guaranteed the loans on them.[1] Benbeniste issued two checks totaling $345,000 to Magnified in March. In a March 4, 2004 Memorandum of Understanding, Preminger outlined a deal in which Benbeniste would receive a 75 percent stake in a limited partnership to be created to hold title to the properties. Magnified was to be the managing partner with a 25 percent interest in the partnership; it was also to receive management fees and be credited with a 10 percent premium over the cost of the properties. The intended limited partnership was never created and the parties' relationship deteriorated over the last quarter of 2004, fueled by a disagreement over a separate business transaction.

In February 2005, Preminger met with Benbeniste and both parties agreed the partnership should be dissolved. Thereafter, Magnified attempted to negotiate a settlement with Benbeniste, including offering to refund the $345,000 to Benbeniste and

[1] For convenience, we will collectively refer to Preminger, Glasberg, and Magnified as Magnified and to Benbeniste and Tenzing as Benbeniste.

pay an additional $70,000 as a return on his investment. Benbeniste rejected all of Magnified's offers. In June 2005, Magnified tendered a check for $379,500 to Benbeniste, representing the refund of the $345,000 plus 10 percent interest. The check was never cashed.

Magnified filed suit against Benbeniste for declaratory relief and to quiet title on June 10, 2005. In a second lawsuit, Benbeniste brought 9 causes of action against Preminger and Glasberg on June 17, 2005, for: (1) quiet title; (2) establishment of a resulting trust; (3) breach of contract; (4) specific performance; (5) breach of fiduciary duty; (6) fraud; (7) conspiracy to commit fraud; (8) promissory estoppel/unjust enrichment; and (9) partition of real property. He primarily claimed a 75 percent ownership interest in the properties. He also filed a lis pendens on the two properties. Magnified cross-complained against Benbeniste in the second action. Notices of related cases were filed and the court consolidated the cases and designated Magnified's case to be the lead case. A bench trial was held in August 2006.

On November 6, 2006, the trial court issued a declaratory judgment as follows:

> "1. Tenzing, LLC and Magnified Properties, LLC were the partners of a two-partner general partnership that they formed on March 3, 2004, and whose particular undertaking was the acquisition and residential development and sale of the Bradley and Osborne properties.
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> "2. The partners agreed that Tenzing would have no right to participate in management and conduct of the acquisition and development and sale of the Bradley and Osborne properties.
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> "3. The partners agreed that the partnership would employ as an agent an entity owned and controlled by the principals of Magnified; that this agent, Passanger, would be paid, as its fee for its services, 10 percent of net sales revenues; and that two-thirds of this fee would not be paid until the residences were built and sold.

"4. The partners agreed that there would be no return of capital to any partner until the residences were built and sold.

"5. The partners agreed that Magnified's capital account would be credited with $97,000 on account of Magnified's contributing to the partnership business Magnified's pre-partnership right to purchase the Bradley and Osborne properties, plus $20,000 on account of Magnified's contributing to the partnership business Magnified's pre-partnership cash payment of $20,000 toward the purchase price.

"6. Magnified's initial capital account was $131,281: $34,281 on account of Magnified's cash capital contribution (of which $20,000 is the contribution mentioned in Paragraph 5), plus $97,000 on account of Magnified's noncash capital contribution. The first $34,281 of partnership expenses paid by Magnified before and after the partnership was formed constituted Magnified's cash capital contribution. Magnified made no capital contributions to the partnership beyond its $131,281 capital contribution. All partnership expenses paid or incurred by Magnified after its payment of the first $34,281 of partnership expenses were advances by Magnified to the partnership beyond the amount of capital Magnified agreed to contribute. As of February 17, 2005, Magnified had received no distributions of capital.

"7. Tenzing's initial capital account was $345,000 on account of its cash capital contribution. Tenzing made no other capital or non-capital advances to the partnership. Tenzing made no payments, and incurred no liabilities, in the course of the business of the partnership or for the preservation of its business or property. As of February 17, 2005, Tenzing had received no distributions of capital.

"8. The profit and loss participation of Tenzing in the partnership was 72.43622%. The profit and loss participation of Magnified was 27.56378%.

"9. Except to the extent specified above, in 2004 the partners made no agreements at variance with the provisions of the California Uniform Partnership Act of 1994.

"10. By agreement of both partners on February 17, 2005, the partnership was dissolved that day.

"11. On February 17, 2005, both partners agreed that there would be a reasonably prompt settlement of Tenzing's partnership account as of February 17, 2005; agreed that Magnified would, reasonably promptly thereafter, make a payment to Tenzing in whatever amount Tenzing was entitled to; agreed that Magnified was free to preserve the former partnership's business as a going concern, and for Magnified's sole benefit, until completion of the development project; and waived the right to have the partnership's business wound up."

The trial court further found the value of the properties to be $1.3 million and that Benbeniste was entitled "to receive from Magnified the payment described in Paragraph 11, plus ten percent per annum simple prejudgment interest thereon from February 17, 2005, to June 6, 2005." By the court's calculation, Benbeniste was to be paid an amount less than his $345,000 investment. The judgment tracked an oral tentative decision issued by the trial court on August 29, 2006. Benbeniste timely appealed.

DISCUSSION

A. The Judgment Lacks Certainty

We initially consider whether Benbeniste's appeal is properly taken from a final judgment. Benbeniste himself contends the judgment is incomplete because it fails to specify the precise amount he is to be paid. Section 577.5 of the Code of Civil Procedure requires, "[i]n a judgment . . . the amount shall be computed and stated in dollars and

cents." (See also, *Kittle v. Lang* (1951) 107 Cal.App.2d 604, 612; Annot., Judgment Ambiguous or Silent as to Amount of Recovery as Defective for Lack of Certainty (1957) 55 A.L.R.2d 723, 727, § 2.) Relying on the statutory maxim "[t]hat is certain which can be made certain" (Civ. Code, § 3538), some courts have recognized that notwithstanding Code of Civil Procedure section 577.5, a judgment is sufficiently certain where the amount, though not expressed in dollars and cents, "is definitely ascertainable." (See *Foust v. Foust* (1956) 47 Cal.2d 121; *In re Marriage of Sandy* (1980) 113 Cal.App.3d 724, 728, fn. 3.)

In *In re Marriage of Sandy, supra*, 113 Cal.App.3d 724, for example, the husband attacked the final dissolution decree as invalid for uncertainty because it ordered him to pay an amount equal to his military retirement check. (*Id.* at pp. 726-728, fn. 3.) The Third District concluded the purpose of Code of Civil Procedure section 577.5 is satisfied, even though the amount is not stated in "dollars and cents," when a judgment has the requisite certainty, or "if the amount, though not so expressed, is definitely ascertainable." (*In re Marriage of Sandy, supra,* at pp. 726-728, fn. 3.) The *In re Marriage of Sandy* court relied on various cases where: (1) the judgment referenced documents setting forth the amount; (2) the judgment contained a formula which could be directly applied to data in the record to calculate the sums owed under the judgment; or (3) the judgment contained a formula which could be applied to easily ascertainable and undisputed amounts. (*Ibid.*) In reaching its decision, the court emphasized that the cited cases were applicable because the amount of the military retirement check was undisputed. (*Ibid.*)

This is a critical distinction because here, the amount to be paid Benbeniste is hotly disputed. The judgment before us merely entitles Benbeniste to receive payment "in whatever amount [he] was entitled to[.]" The record provides no additional assurance as to what this amount is. Indeed, the record shows multiple calculations have been proffered by the parties and the trial court. On August 29, 2006, the trial court found Benbeniste was owed $286,230 in its tentative ruling. The court arrived at this amount by subtracting the management fee and expenses incurred in connection with the

development of the properties from the rental income and appreciation of the properties. The resulting loss was apportioned between Magnified (27.56 percent) and Benbeniste (72.44 percent).[2] Benbeniste's portion of the loss was then subtracted from his $345,000 capital account.[3]

Magnified, "applying the formula contained in the court's proposed judgment for determining the net amount owed by Magnified to [Benbeniste]," sought to amend the proposed judgment to include a payment of $281,880.90, before interest. After further briefing by both parties regarding allowable expenses and fees, among other disputes, Magnified adjusted its payment amount to $288,985.79 before taxes, again using the formula described by the trial court in its oral ruling. Not surprisingly, Benbeniste argued certain management fees and transactional expenses should be excluded from the calculation and claimed he was entitled to a payment of $481,632 plus interest. To arrive at this number, Benbeniste subtracted the loan payoff balances and certain expenses advanced by Magnified from the properties' liquidation value. He then apportioned the resulting figure between himself and Magnified.

Despite the parties' substantial briefing on this issue, the judgment contains no precise amount to be paid to Benbeniste. Instead, the court presented yet another formula, finding the properties to be worth $1.3 million and subtracting from that figure marketing and transactional expenses, management fees, and the payoff balances of the outstanding loans without specifying these amounts in "dollars and cents." It is thus apparent the judgment lacks the requisite certainty by failing to reference any document or present a formula by which a precise amount can be reached.

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[2] Neither party disputes the court's calculation of their proportionate share of the profit or loss from the investment.

[3] We provide only the general formulae by which the trial court or the parties arrived at their totals, not the actual numbers. To do otherwise would unnecessarily complicate the analysis since arithmetic errors were made in some of the calculations and the amounts to be included in the formula were in dispute.

Nevertheless, both parties urge us to "invoke the doctrine of 'saving' premature appeals [citation], or in the alternative consider the briefs on appeal as a petition for writ of mandate or certiorari, so that the substantive issues can be finally determined at this time." We agree with the parties that dismissing the appeal now would lead to a "dilatory and circuitous" result. (*Olson v. Cory* (1983) 35 Cal.3d 390, 401.) We find it in the interest of justice to deem the judgment final. It will prevent unnecessary delay here, where the trial court clearly completed the judgment except in its failure to state a precise dollar amount due Benbeniste. (*See Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761-762, fn. 7.) So, we will resolve the remaining appellate issues brought to our attention by the briefs herein, but remand this matter for a limited determination by the trial court of the proper formula to be used and the precise amounts to be ascribed to each component of that formula in order to reach an amount in dollars and cents to be paid to Benbeniste.

B. The Dissolution Did Not Require Winding Up of Partnership Business

Benbeniste first argues the Uniform Partnership Act of 1994 required the trial court to order the partnership wound up and the properties sold once it found the partnership was dissolved by agreement of the partners. (Corp. Code, § 16100, et seq.) Relying on Corporations Code section 16802,[4] Benbeniste contends, "Immediately upon

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[4] Corporations Code 16802: "(a) Subject to subdivision (b), a partnership continues after dissolution only for the purpose of winding up its business. The partnership is terminated when the winding up of its business is completed. [¶] (b) At any time after the dissolution of a partnership and before the winding up of its business is completed, all of the partners, including any dissociating partner other than a wrongfully dissociating partner, may waive the right to have the partnership's business wound up and the partnership terminated. In that event both of the following apply: [¶] (1) The partnership resumes carrying on its business as if dissolution had never occurred, and any liability incurred by the partnership or a partner after the dissolution and before the waiver is determined as if dissolution had never occurred. [¶] (2) The rights of a third party accruing under paragraph (1) of Section 16804 or arising out of conduct in reliance on the dissolution before the third party knew or received a notification of the waiver may not be adversely affected."

dissolution, the partnership existed only for the purpose of winding up. The partners were not legally entitled to enter into a later agreement to permit Magnified to continue the business exclusive of Tenzing." Thus, according to Benbeniste, the trial court exceeded its jurisdiction when it ignored this statutory dictate.

We disagree. Corporations Code section 16802 serves only as a default provision in the event the partners fail to agree on different terms of dissolution. (Corp. Code, § 16103(a).)[5] The Uniform Partnership Act prohibits deviation from its default provisions in only a few specific instances. None of those situations applies here. Thus, the trial court properly found the parties were free to agree to dissolve the partnership, allow Magnified to continue developing the property, and waive the right to have the partnership's business wound up.

Courts have upheld similar arrangements. For example, in *Driskill v. Thompson* (1956) 141 Cal.App.2d 479, the plaintiff entered into an oral partnership agreement with two other individuals to operate a dance hall, with each partner required to perform various functions. After nearly two years in business, the plaintiff dissolved the partnership and took possession of the physical assets of the business, which he continued to operate. (See also *Speka v. Speka* (1954) 124 Cal.App.2d 181, 190 ["[A]s a general rule upon dissolution of a commercial partnership the succeeding partners have the right to carry on the business under the old name in the absence of a stipulation forbidding it"]; *Neptune Society Corp. v. Longanecker* (1987) 194 Cal.App.3d 1233, 1245-1246; Callison & Sullivan, Partnership Law & Practice (2008) § 16:17 ["While the term winding up is usually used to describe the time during which the partnership business is being completed, its assets liquidated, and its claims settled, a more common situation involves the creation of a new partnership which continues the dissolved partnership's business"].)

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[5] Corporations Code section 16103(a): "Except as otherwise provided in subdivision (b), relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership."

The Uniform Partnership Act does not require the trial court to order the business wound up after the partnership is dissolved. The court did not exceed its jurisdiction in making its decision.

C. Substantial Evidence Supports the Trial Court's Finding

1. Statement of Decision

Benbeniste contends the trial court erred by denying his request for a statement of decision. The statement of decision must explain the legal and factual basis for the decision "as to each of the principal controverted issues" at trial. (Code Civ. Proc., § 632.) "Where counsel makes a timely request for a statement of decision upon the trial of a question of fact by the court, that court's failure to prepare such a statement is reversible error. [Citation.]" (*Social Service Union v. County of Monterey* (1989) 208 Cal.App.3d 676, 681.) The trial court's tentative ruling triggers a 10-day deadline for requesting a statement of decision for bench trials lasting more than one day. (Code Civ. Proc., § 632.) A party who fails to timely request a statement of decision cannot be heard to complain on appeal. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647.)

On the tenth day after the trial court issued its tentative ruling, Benbeniste filed a motion entitled, "Controverted Issues and Proposals Raised by Tenzing, LLC and Maurice Benbeniste Regarding Tentative Ruling Pursuant to Rules of Court Rule 232." Benbeniste asserts this filing should be treated as a request for statement of decision under Code of Civil Procedure section 632, despite the fact it does not explicitly request a statement of decision nor refer to the relevant code section. In fact, the filing specifically sought to "amend" the court's tentative ruling, "pursuant to California Rules of Court Rule 232."

Despite Benbeniste's contention, our review of the record shows that he did not originally intend the filing to constitute a request for a statement of decision. Instead, Benbeniste argued below that the oral tentative decision *was* the statement of decision and therefore admitted he did not request a statement of decision. California Rules of

Court, rule 232[6] permits, but does not require, the trial court to "direct that the tentative decision shall be the statement of decision unless within ten days either party specifies controverted issues or makes proposals not covered in the tentative decision." (Cal.Rules of Court, rule 232(a).) Although the court was silent as to whether its tentative decision was the statement of decision, both parties treated the trial court's oral ruling as a statement of decision and thus, no party timely requested one. Accordingly, we bind the parties to their original interpretation of the court's ruling, however mistaken, and likewise treat the tentative ruling as a statement of decision.

2. Substantial Evidence

We now look to see if there is substantial evidence to support the trial court's findings. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053; *In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 49-50.) Benbeniste primarily takes issue with paragraph 11 of the trial court's judgment, which he claims erroneously found "that the partners had made a post-dissolution agreement which both permitted Magnified to continue the partnership business indefinitely without Tenzing, and further specified the manner in which Tenzing's interest would be computed for purposes of buyout." He contends nothing in the record, much less substantial evidence, supports these findings. After reviewing the record, we disagree.

At trial, Benbeniste testified he "lost heart" for the deal at a meeting in February 17, 2005 and agreed to dissolve the partnership. Preminger testified that he wanted to move forward with the project and Benbeniste did not protest or demand to continue to be involved in the development. Preminger told him that Magnified would "generously compensate" him for the use of his funds. However, Benbeniste rejected every attempt by Magnified to so compensate him, including refusing an offer that would have paid him $70,000 above his $345,000 investment. Instead, Benbeniste sought payment of $700,000 from Magnified based on what he thought the project would be worth at its

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[6] Effective January 1, 2007, rule 232 of the California Rules of Court was amended and renumbered to rule 3.1590.

completion. In short, Benbeniste continued to seek a return on his investment that was based on his 75 percent stake in the development and rejected every offer by Magnified to return his money. There was ample evidence from which the trial court could conclude the parties intended to dissolve the partnership and pay Benbeniste 75 percent of the partnership's value at the time of the dissolution.

Benbeniste's focus on "undisputed testimony from Preminger that his intention was to return to Tenzing all monies which it had invested, plus an additional compensatory sum," is merely an attempt to persuade this court to re-weigh the evidence. This, we will not do. It is evident that the existence of a partnership and the terms under which it operated and dissolved were issues of fact to be determined by the trial court. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1157.) Accordingly, the court was within its jurisdiction to make these factual findings.

D. Benbeniste Was Not Entitled to a Jury Trial

Benbeniste deposited jury fees on May 2, 2006. The parties thereafter submitted briefs regarding whether Benbeniste was entitled to a jury trial. Relying on *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546, 1552-1555, the trial court denied Benbeniste's request for a jury trial on the ground the "gist of the action" was equitable in nature rather than legal. We review the trial court's determination de novo. (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 23.)

To determine whether Benbeniste is entitled to a jury trial, we must first evaluate whether his claims lie in equity or in law. We agree that the gist of Benbeniste's action is essentially one in equity and the relief sought " 'depends upon the application of equitable doctrines.' " (*C & K Engineering Contractors v. Amber Steel Co., Inc. , supra*, 23 Cal.3d at p. 9.) In essence, Benbeniste sought a declaration of the rights and obligations of the parties with respect to the properties. (*Caira v. Offner*, *supra*, 126 Cal.App.4th at p. 25 [it is "well established" that "true declaratory relief actions" are generally equitable in nature].) That Benbeniste also included causes of action for breach of contract, breach of fiduciary duty and fraud does not transform the gist of his action to

a legal one. Those causes of action are premised on the same facts and appear to provide no support for a fraud or breach of contract claim.

In any event, a trial court may separate equitable from legal issues joined in the same action and hold separate trials on the discrete issues, with a bench trial on the equitable issues to be held first. (See Code of Civil Proc., § 1048; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 50; *Walton v. Walton* (1995) 31 Cal.App.4th 277, 293.) "This procedure is particularly useful, where, as here, a determination of the equitable issue may determine the lawsuit and prevent a more costly jury trial. [Citations.]" (*Dills v. Delira Corp.* (1956) 145 Cal.App.2d 124, 129.) Such was the case here; the trial court's decision established the rights and obligations of the parties and left nothing for a jury to determine. In any event, the court allowed Benbeniste to "revisit" the question of a jury trial on the contract and fraud claims "if [he] ma[d]e certain findings that [left] that question open." Benbeniste did not ask for a jury trial on any remaining legal issues after the bench trial.

E. Prejudgment Interest

Benbeniste contends the trial court erred in finding prejudgment interest ceased to run in June 2005, when Magnified tendered a $379,500 check to him (representing a refund of $345,000 plus ten percent interest) to settle his account. According to Benbeniste, prejudgment interest continued to run until the judgment was entered because Magnified failed to tender the full amount of the debt.

We decline to address the issue on the merits. Since we reverse the judgment to permit the trial court to determine the exact amount of damages, we also reverse that part of the judgment denying prejudgment interest. Whether prejudgment interest is to be awarded or whether it should be denied because Magnified's $379,500 tender was legally adequate or because Benbeniste failed to object sufficiently to the tender (see Code Civ. Proc., § 2076) are matters that should be addressed in the first instance by the trial court.

DISPOSITION

The case is remanded to the trial court for a determination of the precise amount to be paid to Benbeniste and the amount, if any, of prejudgment interest. In all other respects the judgment is affirmed. Each party is to bear their own costs on appeal.

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BIGELOW, J.

We concur:

COOPER, P. J.

RUBIN, J.